IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**CRIMINAL ACTION**
v.	:	**NO. 06-392**
	:	
ALBERT KOFSKY	:	
	:	

O R D E R

AND NOW, this 22nd day of June, 2007, upon consideration of Defendant Albert Kofsky's Motion to Compel Discovery (Document No. 54, filed January 21, 2007); the Government's Response and Memorandum of Law in Opposition [to] Defendant's Motion to Compel Production of Handwritten Notes (Document No. 67, filed March 21, 2007); Defendant Albert Kofsky's Omnibus Reply to Responses to his Pretrial Motions (Document No. 70, filed April 4, 2007); the Government's Supplemental Memorandum of Law in Opposition to Defendant's Motion to Compel Production of Handwritten Notes (Document No. 80, filed June 5, 2007); and a letter from defense counsel dated June 20, 2007,[1] following oral argument on June 6, 2007, for the reasons set forth in the attached Memorandum, **IT IS ORDERED**, as follows:

1. Defendant Albert Kofsky's Motion to Compel Discovery is **GRANTED** under Federal Rule of Criminal Procedure 16(a)(1)(B)(ii).

2. On or before June 29, 2007, the government shall serve defendant with copies of all agent rough notes "containing the substance of any relevant oral statement made" by defendant on April 13, 2006.

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[1] The Deputy Clerk shall docket a copy of the letter from defense counsel dated June 20, 2007.

M E M O R A N D U M

I. INTRODUCTION

Defendant, Albert Kofsky, is charged in a 228-count Superseding Indictment in connection with the distribution of prescription diet pills though his medical practice. The Superceding Indictment alleges, *inter alia*, that defendant acquired hundreds of thousands of diet pills, phentermine and phendimetrazine, by misrepresenting to a pharmaceutical wholesaler that he was dispensing the pills within the scope of his professional medical practice, "when, in fact, he was distributing them on a first-come, first-served basis, to whomever walked into" his office. Superceding Indictment ¶ 15.

Specifically, defendant is charged with the following counts: making false statements to obtain controlled substances (Counts One and Two); possession with intent to distribute controlled substances and/or distribution of controlled substances (Counts Three through Ten); mail fraud (Counts Eleven through Twenty-Eight); use of proceeds to promote illegal activity (Counts Twenty-Nine through One Hundred Thirteen); use of proceeds to make purchases in excess of $10,000 (Counts One Hundred Fourteen through One Hundred Twenty-Seven); aggravated structuring (Counts One Hundred Twenty-Eight through Two Hundred Twenty-Seven); and obstruction (Count Two Hundred Twenty-Eight). In addition, defendant is charged with aiding and abetting (Counts One and Two and Counts Five through Two Hundred Twenty-Eight).

Presently before the Court is defendant's Motion to Compel Discovery of rough notes taken by government agents during an April 13, 2006 interrogation of defendant. For the reasons set forth below, defendant's Motion to Compel Discovery is granted.

II. BACKGROUND

On April 13, 2006 defendant was questioned by agents of the Federal Bureau of Investigation (FBI) and the Drug Enforcement Administration (DEA) during the execution of a federal search warrant at defendant's residence in Huntingdon Valley, Pennsylvania. On April 16, 2006, a government agent dictated an eight page, single-spaced FBI 302 Report that, *inter alia*, summarizes defendant's oral statements to the government agents on April 13, 2006.

On August 1, 2006, a federal grand jury issued a sealed Indictment against defendant. The Indictment was unsealed on August 2, 2006. On December 12, 2006, a Superceding Indictment was issued. On January 21, 2007, defendant filed the instant Motion to Compel Discovery of rough notes taken on April 13, 2006 by government agents. The government filed a Response on March 21, 2007. On April 4, 2007, defendant filed a Reply. On June 5, 2007, the government filed a Supplemental Memorandum of Law in opposition to defendant's Motion. On June 6, 2007, the Court held oral argument on several pretrial motions in this case, including defendant's Motion to Compel Discovery.

III. LEGAL STANDARD

Federal Rule of Criminal Procedure 16(a) provides, in relevant part, that:

> Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing . . . the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent.

Fed. R. Crim. P. 16(a)(1)(B)(ii). Prior to 1991, Rule 16(a) required only that "the government must disclose . . . the substance of any relevant oral statement made by the defendant." Fed. R. Crim. P. 16(a)(1)(A). The Advisory Notes to Rule 16 explain that the 1991 amendment to Rule 16(a)

> expand[ed] slightly government disclosure to the defense of statements made by the

> defendant. The rule now requires the prosecution, upon request, to disclose any written record which contains reference to a relevant oral statement by the defendant which was in response to interrogation, without regard to whether the prosecution intends to use the statement at trial. The change recognizes that the defendant has some proprietary interest in statements made during interrogation regardless of the prosecution's intent to make any use of the statements.

Fed. R. Crim. P. 16, Advisory Comm. Notes (1991). The Advisory Notes further state that "[t]he written record need not be a transcription or summary of the defendant's statement but must only be some written reference which would provide some means for the prosecution and defense to identify the statement." Id.

IV. DISCUSSION

In the Motion to Compel Discovery, defendant moves, pursuant to Federal Rule of Criminal Procedure 16(a)(1)(B)(ii), for the production of rough notes taken by the government agents on April 13, 2006. The Court concludes that under the plain text of Rule 16(a)(1)(B)(ii), the production of the agents' rough notes is required. Thus, the Court grants defendant's Motion to Compel Discovery.

Although the Court of Appeals for the Third Circuit has not discussed at length whether agent rough notes are discoverable in light of the 1991 amendment to Rule 16(a), its decision in United States v. Molina-Guevara, 96 F.3d 698 (3d Cir. 1996), is instructive on this issue. In Molina-Guevara, defendant was arrested at an airport, read her rights, and questioned by two agents of the United States Customs Service. Id. at 700. On direct appeal, defendant argued that "the district court erred in refusing to order production by the government of [the Customs Agent's] handwritten notes of her interview with the defendant, notes from which the agent's final report was prepared." Id. at 705. In response, the government conceded that the agent's rough notes were discoverable under Rule 16(a). In its opinion, the Third Circuit held, as follows: "**[a]s the government conceded before us,**

production of these notes was required by Federal Rule of Criminal Procedure 16. Whether or not this violation was harmless is now a moot issue. On remand, the notes will be produced." Id. (emphasis added).

In response to defendant's Motion, the government argues that Molina-Guevara is distinguishable because that case "clearly involved an interrogation" while this case allegedly does not. Tr. 6/6/07 at 23. In support of its argument, the government relies primarily on United States v. Scott, 223 F.3d 208 (3d Cir. 2000). In Scott, the defendant was removing his boot at a police station, and a .45 caliber bullet fell to the floor. In response, defendant "blurted out 'Oh, shit'" and ceased denying possession of a weapon. Id. at 209. On direct appeal, the defendant argued that the government violated Rule 16(a) by failing to disclose the "Oh, shit" remark until one week before trial. The Third Circuit held that no error occurred because "the government is not required to provided discovery of a defendant's 'unrecorded, spontaneous oral statement not made in response to interrogation.'" Id. at 212 (quoting United States v. Kusek, 844 F.2d 942, 948-49 (2d Cir. 1988)).

In this case, unlike Scott, there is no suggestion that defendant's statements to the government agents were "spontaneous oral statement[s]" or were "blurted out." See id. at 209, 212. Rather defendant's statements were the product of extensive questioning by FBI and DEA agents during the execution of a search warrant on defendant's residence. As a result of this questioning, the agents produced an eight page, single-spaced FBI 302 Report of defendant's oral statements. Accordingly, Scott is inapposite to this case. See United States v. Blatt, No. 06-0268 (E.D. Pa. Jun. 20, 2007) (Stengel, J.) (distinguishing Scott and holding that defendant was interrogated under Rule 16(a)(1)(B)(ii)).

Moreover, this Court finds persuasive the opinions of several district courts that have held that

Rule 16(a)(1)(B)(ii) requires the production of agent rough notes under circumstances analogous to this case. In Blatt, defendants moved for the production of agent rough notes of interviews with employees of an organizational defendant. The "statements at issue were made by witnesses during formal interviews conducted by the government during an ongoing grand jury investigation. Many of the witnesses were represented by counsel during the questioning." Id. at 3 n.1. The Blatt court held that under Rule 16(a)(1)(B)(ii), "[t]he responses of these witnesses were made in response to interrogation" and the agents' rough notes of their responses were therefore discoverable. Id. at 3 n.1, 6.

In United States v. Stein, 424 F. Supp. 2d 720 (S.D.N.Y. 2006), defendants moved for the production of contemporaneous notes made by government agents during interviews and proffer sessions with defendants. Citing Molina-Guevara, the Stein court granted defendants' motion under Rule 16(a)(1)(B)(ii), holding that "the record requested 'must only be some written reference which would provide some means for the prosecution and the defense to identify the statement.' The rough notes defendants request clearly fall within this definition." Id. at 728 (citing Molina-Guevara, 96 F.3d at 705).

In United States v. Ferguson, 478 F. Supp. 2d 220, 236 (D. Conn. 2007), defendants were interviewed by government agents as potential witnesses in the presence of counsel. Upon defendant's motion for the production of rough notes, the Ferguson court held that "while the Advisory Committee's intent when it enacted the 1991 amendment remains less than clear, the plain language of [Rule 16(a)(1)(B)(ii)] requires disclosure of the interview notes . . . Since the interview notes requested by defendants are 'a' written record within this category, they must be disclosed under the rule." Id. at 237-38. See also United States v. W.R. Grace, 401 F. Supp. 2d 1087 (D. Mont. 2005) (holding that "Rule 16(a)(1)(B)(ii) requires the production of rough interview notes"); United States v. Vallee, 380

F. Supp. 2d 11 (D. Mass. 2005) (holding that Rule 16(a)(1)(B)(ii) requires production of agent's rough notes); United States. v. Almohandis, 307 F. Supp. 2d 253 (D. Mass. 2004) (holding that Rule 16(a)(1)(B)(ii) requires production of "the agents' rough notes of the interviews with the defendant").

The government further argues that the agents' rough notes of defendant's oral statements are not a "record" made before arrest because "[a] record is a more formal and organized document and recording." Tr. 6/6/07 at 20. This Court disagrees. The Advisory Notes to Rule 16 provide that a "written record need not be a transcription or summary of the defendant's statement but must only be **some written reference** which would provide some means for the prosecution and defense to identify the statement." Fed. R. Crim. P. 16, Advisory Comm. Notes (1991) (emphasis added). Under this definition, the agents' rough notes of the April 13, 2006 questioning of defendant are a "record" of defendant's statements made before arrest. See Blatt, No. 06-0268 at 4 ("Courts who have considered this issue have read the plain language of Rule 16 expansively, finding that agent rough notes qualify as written records."); United States v. Griggs, 111 F. Supp. 2d 551, 554 (M.D. Pa. 2000) (holding that rough notes made by state police officer were not discoverable, but observing that "[i]f [defendant] had made his statement to a DEA agent or an FBI agent, the notes likely would be discoverable . . . because the language of the rule is to the effect that *any* written record of an oral statement by the defendant to a known government agent must be disclosed").[2]

V. CONCLUSION

For the foregoing reasons, the Court concludes that, under the plain text of Rule 16(a)(1)(B)(ii) and Molina-Guevara, the rough notes taken by government agents during the April 13, 2006

[2] In addition, the government argues that the agent rough notes were not "made before" arrest under Rule 16(a)(1)(B)(ii). The Court rejects this argument.

questioning of defendant are "any written record containing the substance of any relevant oral statement made before or after arrest . . . in response to interrogation by a person the defendant knew was a government agent."[3] Thus, defendant's Motion to Compel Discovery is granted. The government shall serve defendant with copies of all agent rough notes from the April 13, 2006 interrogation of defendant on or before June 29, 2007.

BY THE COURT:

/s/ Honorable Jan E. DuBois

JAN E. DUBOIS, J.

[3] The Court does not rule at this time on whether the questioning of defendant on April 13, 2006 was a "custodial interrogation" under the Fifth Amendment and Miranda v. Arizona, 384 U.S. 436 (1966). The Court will rule on this issue in due course.